

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

<b>IN RE:</b>	)	<b>Docket No. 5-TSCA-96-019</b>
	)	
<b>Emmanuel Baptist Church</b>	)	
<b>Chicago, Illinois</b>	)	
	)	
<b>Respondent.</b>	)	

**Default Order**

1. The United States Environmental Protection Agency ("U.S. EPA") initiated this civil administrative proceeding for the assessment of a penalty pursuant to Section 207(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. Section 2647(a).

**Finding of Fact**

2. On September 25, 1996, the date on which this proceeding was initiated, Complainant was by lawful delegation, the Chief of the Pesticides and Toxics Division, Region 5, U.S. EPA.

3. Respondent is Emmanuel Baptist Church which owns Emmanuel Christian School.

4. Emmanuel Christian School is a private school with approximately 600 students and 55 employees.

5. On or about February 9, 1994, a U.S. EPA representative conducted an AHERA compliance inspection at Respondent's school.

6. During the February 9, 1994 inspection, the Inspector observed several areas where suspect materials were found. The inspector observed the following suspect materials:

a) 9" x 9" vinyl floor tiles, approximately 10,000 square feet throughout the basement, b) 2' x 4'

suspended ceiling tiles, approximately 500 square feet above the Gym's stage area, c) 12" x 12" vinyl floor tiles, approximately 20,000 square feet throughout the Gym, the first and second floors, d) plaster ceiling, approximately 20,000 square feet throughout the building, e) pipe insulation, approximately 50 ln. ft. in the first floor kitchen and storage, f) 4" high vinyl wall base, approximately 10,000 ln. ft. throughout the building, g) stair treads, approximately 300 square feet, h) floor carpet mastic, approximately 8,000 square feet throughout the building, I) drywall partition, approximately 200 square feet in first floor office near church, and j) pipe insulation (looked like fiberglass) wrapped with duct tape, approximately 200 ln. ft. in the boiler room.

7. Mr. Curry, the Pastor at Emmanuel Baptist Church, stated that no management plan for the school existed, when asked by the Inspector for its production.

8. Complainant filed a one-count Complaint and Notice of Opportunity for Hearing on September 25, 1996, charging that the Respondent violated Section 203(I) of TSCA, 15 U.S.C. Section 2643(I), and the "Asbestos-Containing Materials in Schools" rule ("the Rule") promulgated at 40 C.F.R. Part 763, Subpart E.

9. In the Count, Complainant alleged that Respondent violated Section 203(I) of TSCA, 15 U.S.C. Section 2643(I) and the Rule, 40 C.F.R. Section 763.83, by failing to develop an asbestos management plan for Emmanuel Christian School. Complainant sought a civil penalty of \$4,000 pursuant to Section 207(a)(3) of TSCA, 15 U.S.C. Section 2647(a)(3), for this violation.

10. The Complaint specified that, in order for Respondent to avoid being found in default, Respondent must file a written answer within 20 days of service of the Complaint.

11. The Complaint was mailed to Respondent via certified mail and the return receipt indicates that Respondent was served on September 27, 1996.

12. As of the date of this Proposed Default Order, Respondent has not yet filed an answer to this Complaint.

#### **Conclusions of Law**

13. The Respondent has its administrative offices located at 8301 South Damen Avenue, Chicago, Illinois (Administrative Facility).

14. At all times relevant to this Complaint, Respondent was and continues to be a Local Education Agency (LEA) as that term is defined in Section 202(7) of TSCA, 15 U.S.C. Section 2642(1) and Section 763.83 of the Rule, and is therefore subject to TSCA and the Rule.

15. At all times relevant to this Complaint, Respondent leased, owned, or otherwise used the Emmanuel Baptist Church located at 8301 South Damen Avenue, Chicago, Illinois, (school facility), as a "school," as that term is defined in Section 202(12) of TSCA, 15 U.S.C. Section 2642(12) and Section 763.83 of the Rule.

16. At all times relevant to this Complaint, Respondent leased, owned, or otherwise used its Administrative facility as a "school building" as that term is defined at Section 763.83 of the Rule.

17. Respondent leased, owned, or otherwise used its school facility since the 1975 school year.

18. Section 763.93(a)(1) of the Rule requires that, in relevant part, each LEA shall develop an asbestos management plan for each school, including all buildings that they lease, own, or otherwise use as school buildings, and submit the plan to an Agency designated by the

Governor of the State in which the LEA is located.

19. Section 207(a)(3) of TSCA, 15 U.S.C Section 2647(a)(3), states, in part, that any LEA which fails to develop a management plan pursuant to the regulations under Section 203(I) of TSCA, 15 U.S.C Section 2643(I), is liable for a civil penalty. Section 207(a) further states that, for the purposes of assessing civil penalties, a violation means a failure to comply with respect to a single school building.

20. Respondent's failure to develop an asbestos management plan constitutes a violation of Section 203(I) of TSCA, 15 U.S.C. Section 2643(I) and 40 C.F.R. Section 763, Subpart E. Such failure is unlawful pursuant to Section 207(a)(3) of TSCA, 15 U.S.C. Section 2647(a)(3).

21. Section 207(a) of TSCA, 15 U.S.C. Section 2647(a), authorizes a civil penalty of up to \$5,000 for each day during which the violation continues.

22. Section 22.17(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules of Practice"), 40 C.F.R. Section 22.17(a), provides that "a party may be found in default (1) after motion, upon failure to file a timely answer to the complaint. . ."

23. Section 22.15(a) of the Consolidated Rules of Practice, 40 C.F.R. Section 22.15(a), provides that an answer to a complaint for the assessment of a civil penalty must be filed with the Regional Hearing Clerk within twenty (20) days after service of the complaint.

24. Section 22.17 (a) of the Consolidated Rules of Practice, 40 C.F.R. Section 22.17(a), provides that for purposes of the pending action, default by a respondent constitutes an admission of all facts alleged in the complaint and a waiver of respondent's

right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default.

40 C.F.R. Section 22.17(a).

25. Respondent is in default for purposes of the pending action for failing to file a timely answer. For purposes of the pending action, all facts alleged in the Complaint are admitted and Respondent has waived its right to a hearing on such factual allegations.

#### Review of Penalty

The remaining issue is the assessment of an appropriate civil penalty. Section 22.17(a) of the Consolidated Rules states that "the proposed civil penalty shall become due and payable by respondent without further proceedings sixty (60) days after a final default order issued upon default." However, Section 22.27(b), as it relates to penalties in initial decisions states that the Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted." This sentence suggests a responsibility on the part of the Presiding Officer to review the amount of the civil penalty in a default case. This responsibility to review the amount of civil penalty in a default proceeding is also suggested by the decision in Katzon Bros., Inc. v. U.S. EPA, 839 F.2d 1396 (10th Cir. 1988).

The Declaration in Support of Complainant's Motion for Default Judgment prepared by John Love, Environmental Protection Specialist for the Waste, Pesticides and Toxics Division, EPA, sets forth EPA's calculation in support of its proposed penalty of \$4,000. The Declaration states that the proposed civil penalty is based upon the statutory factors specified in Section 207© of TSCA. These factors include "significance of the violation, culpability of the violator,

including any history of previous violations under this chapter, ability of the violator to pay the penalty and ability of the violator to continue to provide educational services to the community." Section 207(a) of TSCA authorizes a maximum civil penalty of \$5,000 for each day during which the violation continues.

The Declaration further reports that the penalty was calculated pursuant to the January 31, 1989 Interim Final Enforcement Response Policy (ERP) for the Asbestos Hazard Emergency Response Act," as modified in part on January 19, 1990 and January 27, 1992. The policy is based upon the statutory penalty factors and is used to ensure consistent and equitable penalty assessment of the regulated community. The gravity based matrix on page 11 of the ERP was used. Pursuant to the ERP, failure to develop an asbestos management plan is a circumstance level 2. The extent level is major, as more than 3000 square feet of asbestos containing material was involved. Given these levels of circumstance and extent, the appropriate penalty from the matrix is \$4,000. As the Respondent has no prior history of TSCA violation, no upward adjustment of penalty was proposed.

#### Penalty Assessment

EPA has properly applied the ERP. Based upon the facts in this case, upon consideration of the statutory requirements, the ERP and the criteria set for at 40 C.F.R. 22.17(a), Complainant's proposed penalty of \$4,000. is appropriate. A penalty of \$4,000 is hereby assessed.

#### Order

Based on the foregoing, and pursuant to Section 207(a) of TSCA, 15 U.S.C. Section 2647(a), it is hereby ordered that:

A. Respondent shall pay the United States of America a civil penalty in the sum of \$4,000. Payment shall be made by certified or cashier's check payable to "Treasurer of the United States of America" within sixty (60) days after a final order is filed with the Regional Hearing Clerk. Respondent shall mark on the reverse of the check, "For Deposit into the Asbestos Trust Fund, 20 U.S.C. § 4022", and shall send it, with a transmittal letter identifying the Respondent and docket number of this Complaint, to the:

U.S. Environmental Protection Agency  
Headquarters Accounting Operations Branch  
P.O. Box 360277M  
Pittsburgh, Pennsylvania 15251

A copy of the payment shall be mailed to the Regional Hearing Clerk (Mail Code R-19J), Counsel for the Complainant (Mail Code C-29A) and the Branch Secretary, Pesticides & Toxics Branch (Mail Code DRT-14J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590.

B. On any amount overdue under paragraph A above, interest shall accrue on the debt at the rate established by the Secretary of the Department of Treasury, pursuant to 31 U.S.C. Section 3717, and published in the Federal Register quarterly. A late payment handling charge of fifteen dollars (\$15.00) will be assessed after thirty (30) days, with an additional charge of fifteen dollars (\$15.00) for each subsequent 30-day period over which an unpaid balance remains. In addition, a six percent (6%) per annum penalty will be assessed on any principal amount not paid within ninety days (90) of the date that a fully executed copy of this Consent Agreement and consent Order is filed with Regional Hearing Clerk.

C. Respondent's failure to comply with the provisions of paragraph A shall result in

the referral of this matter to the U.S. Department of Justice for collection. The validity, amount and appropriateness of the penalty is not subject to review in a collection proceeding, as stated at Section 16(a) of TSCA, 15 U.S.C. Section 2615(a).

SO ORDERED.

Dated: 4-6-97

Michelle V. Jordan  
for David A. Ullrich  
Acting Regional Administrator

Prepared by Regina M. Kossek, Regional Judicial Officer